( )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No.

CHARLES L. DOUGLAS, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH DISTRICT

INDEX

	Original	Print
Proceedings in court of appeals of New York	a	1
Caption (omitted in printing)	a	
Remittitur	b	1
Record on appeal	1	2
Statement under rule 234	1	2
Notice of appeal	3	3
Order appealed from	4	4
Notice of motion for order vacating service of summons	6	5
Affidavit of Frank E. Hall	8	6
William H. Bierach	14	10
Charles D. Lewis	16	11
Charles L. Douglas	22	16
Opinion, Tompkins, J	23	16
Stipulation waiving certification	24	17
Stipulation as to citizenship, appellate division	25	17
Order of affirmance, appellate division	26	18
Judgment of affirmance	28	18
Notice of appeal to court of appeals	29	19
Affidavit of no opinion	31	20
Stipulation waiving certification	32	21
Clerk's certificate (omitted in printing)	32	
Order	33	21
Judgment	35	22
Order allowing certiorari		24

[fols. a & b]

IN COURT OF APPEALS OF NEW YORK

CHARLES L. DOUGLAS, Appellant,

ag'st

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Respondent

REMITTITUR—Filed June 6, 1928

Be it remembered that on the 25th day of April in the year of our Lord one thousand nine hundred and twenty-eight, Charles L. Douglas, the appellant in this cause, came here unto the Court of Appeals, by Thomas J. O'Neill, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The New York, New Haven and Hartford Railroad Company, the respondent in said cause, afterwards appeared in said Court of Appeals by John M. Gibbons, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. Charles D. Lewis, of counsel for the appellant, and by Mr. E. R. Brumley, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs on the authority of Murnan v. Wabash Railway Company, 246 N. Y., 244.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore it is considered that the said judgment be affirmed with costs on the authority of Murnan v. Wabash Railway Company, 246 N. Y., 244, as aforesaid.

[fol. c] And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Ap-

peals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York.

May 29, 1928.

Certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

[fol. 1] SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

CHARLES L. DOUGLAS, Plaintiff-Appellant,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant-Respondent

STATEMENT UNDER RULE 234

This action was commenced by the service of the summons and complaint upon the defendant in the City of New York, on the 22nd day of December, 1927. The defendant has not served its answer to the complaint.

The names of the parties are as above set forth and there has been no change of parties or their attorneys.

On December 31, 1927, the defendant served upon the plaintiff's attorney its notice of motion, returnable at Special Term of the Supreme Court, Westchester County, on January 9, 1928, for an order vacating the service of the summons and complaint herein and dismissing the action on the ground that the cause of action herein, having accrued without the State of New York the jurisdiction of the Court, by reason of the non-residence of the parties, is

wholly discretionary, and that the Court should, in the exercise of its discretion, decline to retain jurisdiction, and on the further ground that Section 47, Subdivision 4 of the General Corporation Law of New York, under which this suit is attempted to be brought, is invalid under the com- [fol. 2] merce clause of the Federal Constitution insofar as it permits the Court to assert jurisdiction, and that both the statute and this action constitute an unjust burden on interstate commerce.

The motion was adjourned from the 9th day of January, 1928, to the 27th day of January, 1928, when it came on for argument before Mr. Justice Arthur S. Tompkins, who, on the 3d day of February, 1928, handed down a memorandum opinion granting defendant's motion to vacate the service of the summons and complaint herein and to dismiss the action on the ground that although the Court had discretionary jurisdiction of the action it should not, in the exercise of sound discretion, entertain the case and should remit the non-resident plaintiff to another forum.

On February 15, 1928, an order dismissing the action, pursuant to said opinion, was entered in the office of the Clerk of the County of Westchester.

On February 16th, 1928, an appeal from said order was taken by the plaintiff to the Appellate Division, Second Department.

[fol. 3] Supreme Court of New York, Westchester County

Charles L. Douglas, Plaintiff,

against

The New York, New Haven and Hartford Railroad Company, Defendant

Notice of Appeal

Sirs: Please take notice that the plaintiff herein hereby appeals to the Appellate Division of the Supreme Court, in and for the Second Department, from the order made in the above entitled action on the 11th day of February, 1928, and filed and entered in the office of the Clerk of the County

of Westchester on the 15th day of February, 1928, granting the defendant's motion to vacate the service of the summons and complaint and dismissing the action; and the plaintiff hereby appeals from the whole of said order, and from each and every part thereof.

Dated White Plains, N. Y., February 16th, 1928.

Yours, &c., Thomas J. O'Neill, Attorney for Plaintiff, 189 Main Street, White Plains, N. Y.

[fol. 4] To John M. Gibbons, Attorney for Defendant, Room 3841, Grand Central Terminal, New York City; Clerk of the County of Westchester.

In Supreme Court of New York

[Title omitted]

Order Appealed From

The above named defendant having duly moved this Court by a notice of motion, dated December 30th, 1927, returnable January 9th, 1928, for an order vacating the service of the summons and complaint herein and dismissing the action; and the hearing of said motion having been adjourned to the 27th day of January, 1928, and said motion having duly come on to be heard on said last mentioned date; and after hearing Mr. Frederick J. Rock, of counsel [fol. 5] for the defendant, in support of said motion, and Mr. Charles D. Lewis, of counsel for the plaintiff, in opposition thereto;

Now, on reading and filing said notice of motion, dated December 30th, 1927, copy of the complaint herein, the affidavit of Frank E. Hall, verified December 30th, 1927, and the affidavit of William H. Bierach, verified January 4th, 1928, in support of said motion; and on reading and filing the affidavit of Charles D. Lewis, verified January 23rd, 1928, and the affidavit of Charles L. Douglas, the plaintiff herein, verified January 20th, 1928, in opposition thereto, it is

Ordered that the defendant's motion be, and the same is hereby, granted, without costs, and that the service of the

summons and complaint herein be, and the same hereby is, vacated, and this action is dismissed.

A. S. Tompkins, Justice of the Supreme Court.

[fol. 6] In Supreme Court of New York

[Title omitted]

Notice of Motion

Sir: Please take notice that upon the affidavit of Frank E. Hall, verified December 30th, 1927, and upon the complaint herein, a motion will be made at a Special Term of the New York Supreme Court, to be held in and for the County of Westchester, at White Plains, New York, on the 9th day of January, 1928, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for an order vacating the service of the summons and complaint herein and dismissing the action on the ground that the cause of action herein, having accrued wholly without the State of New York, the jurisdiction of this Court, by reason of the non-residence of the parties hereto, is wholly discretionary, and this Court should, in the exercise of its discretion, decline to retain jurisdiction thereof, and on the further ground that Section 47, sub-division 4, of the General Corporation Law of New York, under which this suit is attempted to be brought, is invalid under the commerce clause of the Federal Constitution in so far as it permits the Court to assert jurisdiction, and that both the statute and this action constitute an unjust burden on interstate commerce. [fol. 7] And the defendant will move for such other and further relief as may be just and proper in the premises.

Answering affidavits must be served at least five days before the return day hereof.

Dated New York, December 30th, 1927.

Yours, &c., John M. Gibbons, Attorney for Defendant. Office and Post Office address: Room 3841, Grand Central Terminal, New York City.

To Thomas J. O'Neill, Esq., Plaintiff's Attorney, 189 Main Street, White Plains, N. Y.

[fol. 8] IN SUPREME COURT OF NEW YORK

[Title omitted]

AFFIDAVIT OF FRANK E. HALL

CITY AND COUNTY OF NEW YORK, ss:

Frank E. Hall, being duly sworn, deposes and says:

I am an officer, to wit, Assistant Treasurer of The New York, New Haven and Hartford Railroad Company, the defendant herein.

This action was attempted to be brought by the service of a summons and complaint upon deponent on December 22nd, 1927, at Room 3605 in the Grand Central Terminal, New York City. The defendant has not answered for the reason that its time to answer or otherwise move will not expire until the 11th day of January, 1928.

The complaint sets up an alleged cause of action by the plaintiff, Charles L. Douglas, on account of personal injuries stated to have been sustained by him on December 1st, 1927, while in the defendant's employ at the defendant's railroad yards in the City of Waterbury, in the State of Connecticut, as the result of being caught and crushed between cars on tracks as to which plaintiff alleges defendant negligently permitted insufficient clearance between the tracks. A copy of the complaint is hereto attached [fol. 9] marked "Exhibit A" and is made a part hereof. The plaintiff demands judgment in the sum of $50,000 for the injuries in said complaint alleged to have been sustained.

Upon the institution of this suit, the summons and complaint served upon deponent as aforesaid, were transmitted to our counsel in order that the circumstances of the accident and the merits of the case might be investigated in the usual course. Upon the basis of such investigation, I am informed and believe that the defendant has a good and substantial defense upon the merits, namely, that the defendant was wholly free from negligence, and the alleged injuries occurred while the plaintiff was in the employ of the defendant and engaged in work that involved risks which were open, obvious and well known to him at all times during his employment and at the time when it is

alleged that his injuries occurred, and that such risks were assumed by the plaintiff and his alleged injuries arose out of and resulted from such risks.

While the complaint is silent as to the residence of the plaintiff, the records of the defendant show that his residence is at 90 Knoll Street, Waterbury, Conn.

That the defendant is a foreign railroad corporation, organized under and by virtue of the Laws of the State of Connecticut, and is authorized to do business in the State of New York, having applied for and received a certificate for that purpose from the Secretary of said State, as provided by the General Corporation Law of the State of New York, and deponent has been designated as a person upon whom process may be served within the said State of New York.

[fol. 10] The alleged accident is stated to have occurred in Waterbury, Conn., many miles from the State of New York and the jurisdiction of this Court. I am informed and believe that the defendant, for the proper defense of this suit, will be required to call from seven to ten or more witnesses, all of whom are employed either as engineers, brakeman, yardmen or in other capacities by the defendant in that vicinity, or are employed in other lines of business within that locality. If the defendant is required to proceed with the trial of this action in the State of New York, it will be necessary for it to bring these witnesses from the State of Connecticut, many of whom are employed in the operation of the road of the defendant. To call these men from their usual duties to attend the trial of this case at a place so far distant from their place of employment as White Plains, N. Y., would necessitate absence from their duties for an indefinite period of time, thus interfering with the efficiency in the operation of the defendant's railroad service; it would necessitate heavy expense in the maintenance of such witnesses during the trial, and further expense in the employment of other men to fill their duties during their absence, thereby greatly interfering with interstate commerce and causing the defendant great hardship and expense.

The plaintiff himself, deponent believes, is the sole witness for the plaintiff, with the possible exception of medical testimony, which, being in the nature of expert testi-

mony, can be secured in any locality. Deponent further believes that the convenience of the plaintiff would best be subserved by the trial of this case in the courts where the alleged accident took place, and where the plaintiff resides.

This affidavit is made in support of a motion of the de- [fol. 11] fendant for an order of this court directing the dismissal of the complaint herein on the ground that the cause of action herein having accrued wholly without the State of New York, the jurisdiction of this Court, by the reason of the non-residence of the parties hereto, is wholly discretionary, and this Court should, in the exercise of its discretion, decline to retain jurisdition thereof, and on the further ground that Section 47, sub-section 4, of the General Corporation Law of New York, under which this suit is attempted to be brought, is invalid under the commerce clause of the Federal Constitution in so far as it permits the Court to assert jurisdiction, and that both the statute and this action constitute an unjust burden on interstate commerce.

No previous application has been made for the order herein prayed for.

Frank E. Hall.

Sworn to before me this 30th day of December, 1927. Adolph W. Antelmann, Notary Public. Bronx Co. No. 26. Register No. 2940. Cert. filed in N. Y. Co. 293. Reg. No. 9219. Cert. filed in Westchester Co. Term expires March 30, 1929. (Seal.)

[fol. 12] Supreme Court, Westchester County

Charles L. Douglas, Plaintiff,

against

The New York, New Haven and Hartford Railroad Company, Defendant

"Schedule A"

The plaintiff complaining of the defendant alleges as follows upon information and belief:

1. That at all the times herein mentioned defendant was and it now is a foreign Connecticut State railroad common

carrier corporation, and on December 1, 1927, the plaintiff was injured while in the defendant's employ in the defendant's railroad yards at Waterbury, Connecticut.

2. That at the time the plaintiff was so injured he and the defendant were then and there engaged in Interstate Commerce between the different States of the United States of America, and this action is brought under the Acts of Congress of the United States.

3. That on said date, and in said yards, and while plaintiff was in defendant's employ and engaged in said interstate commerce he was caught and crushed between cars on tracks as to which the defendant negligently and carelessly caused and permitted insufficient clearance between the tracks, and the plaintiff sustained fractures and permanent injuries to his ribs, and a permanent injury to his lungs, and ruptures in and permanent injuries to his legs, and his body, health, organs, nerves and nervous system were otherwise permanently injured, and he was rendered [fol. 13] sick, sore and disabled and permanently will so remain, and he was otherwise permanently injured internally and externally, and he lost and will lose his wages at his usual vocation, and has spent and will be obliged to spend sums of money in endeavoring to cure himself, all to his damage in the sum of $50,000, and all being caused without any negligence on his part, but solely by the negligent and wrongful acts and omissions of the defendant, its officers, agents and employees, and by the negligent defects in the defendant's ways, works, tracks, plant and equipment.

Wherefore plaintiff demands judgment against the defendant in the sum of $50,000., together with the costs and disbursements of this action.

Thomas J. O'Neill, Attorney for Plaintiff, 189 Main Street, White Plains, N. Y.

State of New York,
County of Westchester, ss:

Charles L. Douglas, being duly sworn, deposes and says: That he is the plaintiff in the within entitled action, that he has heard read the foregoing complaint and knows the

contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Charles L. Douglas.

Sworn to before me this 22nd day of December, 1927.
Frank J. Hyland, Notary Public, Westchester Co., N. Y.

[fol. 14] In Supreme Court of New York

[Title Omitted]

Affidavit of William H. Bierach

State of Connecticut,
City of New Haven,
County of New Haven, ss:

William E. Bierach, being duly sworn, deposes and says that he is employed in the Connecticut Claims Department of The New York, New Haven and Hartford Railroad Company, the defendant herein, and is familiar with the facts as developed by the investigation in this case. That in investigating this case, deponent finds that the plaintiff herein is, and has been, a resident of Waterbury, Conn., for several years, and now resides with his family at 90 Knoll Street, Waterbury, Conn. That deponent personally conferred with the plaintiff herein several times in connection with this case and has always found the plaintiff at his home at 90 Knoll Street, Waterbury, Conn.

William H. Bierach.

[fol. 15] Sworn to before me this 4th day of January, 1928.
John F. Condon, Notary Public. (Seal.)

State of Connecticut,
County of New Haven, ss:

I, Alfred N. Wheeler, Clerk of the Superior Court, the same being a court of record, within and for said County and State, and the officer authorized by the laws of the

State of Connecticut to make the following certificate of the county of New Haven, do hereby certify:

That John F. Condon, Esquire, whose name is subscribed to the annexed instrument, and thereon written, and before whom the annexed acknowledgement, oath, or affidavit was taken, was at the time of taking such acknowledgement, oath or affidavit a notary public in and for said county of New Haven, residing in said County, duly authorized to take the same, and the officer duly authorized by the laws of said State to take and certify the acknowledgement and proof of deeds to be recorded in said State; and further, that I am well acquainted with the handwriting of such officer, and verily believe that the signature to such acknowledgement, jurat or certificate is genuine. And I further certify that the impression of seals of Notary Publics is not required to be filed in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at New Haven, Connecticut, this 4th day of January A. D. 1928.

Alfred N. Wheeler, Clerk. (Seal.)

[fol. 16] In Supreme Court of New York

[Title omitted]

Affidavit of Charles D. Lewis

County of Westchester, ss:

Charles D. Lewis, being duly sworn deposes and says: I am an attorney and counsellor at law, associated with Thomas J. O'Neill, the attorney for the plaintiff herein, and am familiar with the facts in this case.

This affidavit is submitted in opposition to defendant's motion to vacate the service of the summons and complaint herein and to dismiss the action. The plaintiff claims that this motion should be denied because:

(1) The complaint alleges that at all the times mentioned therein the defendant was a foreign Connecticut State railroad common carrier corporation, and that at the time the plaintiff was injured, December 1, 1927, plaintiff and de-

fendant were engaged in Interstate Commerce, and that the action is brought under the Acts of Congress of the United States. (Federal Employer's Liability Act).

The moving affidavit does not deny that at the time of the accident the plaintiff and defendant were engaged in Interstate Commerce, and admits that the defendant is a [fol. 17] Connecticut corporation authorized to do business in the State of New York and that the service of the summons and complaint was made upon the person duly designated in the State of New York to receive such service.

The facts in this case are beyond dispute that the plaintiff was injured while in the employ of the defendant in the yards of the defendant at Waterbury, Conn., where the plaintiff resides and that by reason of the accident the plaintiff received serious permanent physical injuries.

The basis of defendant's application as set forth in the moving affidavit relates to the convenience of witnesses for both the plaintiff and the defendant, and deponent submits that since this is not an application for the change of venue but for dismissal that the convenience of witnesses furnishes no warrant either as matter of law or as matter of discretion for a dismissal.

A further ground set forth in the moving papers is that Section 47, Subdivision 4 of the General Corporation Law of the State of New York is invalid under the Commerce Clause of the Federal Constitution. There is likewise no merit in such contention as the same question was raised in Murnane vs. Wabash Railway Company, 246 N. Y. 249, wherein it was held that the jurisdiction of this Court was discretionary and that the assumption of jurisdiction could not be refused for reasons of convenience but could only as a matter of sound judicial discretion because "The rules of liability under the Federal Act are of general application. They are in this respect wholly unlike local statutes peculiar to the legislative policies of a single State."

The only other point in the defendant's application is that as a matter of discretion the Court should refuse to [fol. 18] entertain jurisdiction of suits brought by non-residents of adjoining states against non-residents of the said adjoining state where the Courts of that state are open to the parties to the litigation.

Upon the question deponent submits, upon information and belief, that defendant has its general office and employs many thousands of employees in the State of Connecticut, and is strongly entrenched in that State, and is not without powerful influence therein, and the plaintiff prefers to bring this suit in a place which will constitue more neutral ground, and where he will have an even chance of getting justice.

Furthermore, deponent submits that the grounds of defendant's application are wholly immaterial in a case brought under the Federal Employers Liability Act and urges the immateriality of such point with all due respect and in face of the decision of the Court of Appeals in Hurnan vs. Wabash Railway, 246 N. Y. 249, upon the following grounds:

1. That the jurisdiction of the Supreme Court of the State of New York was neither increased nor decreased by reason of the enactment of the Federal Employers Liability Act (Mondeau vs. N. Y. N. H. & H. R. R. Co., 233 U. S. 1) and that the Court's jurisdiction is governed solely in transitory tort actions by the original Colonial Statute of May 6, 1691, creating the Court, and has not and cannot be abridged nor limited in such actions by any amendment to the Constitution of the State of New York nor the statutory law of the State of New York (De Hart vs. Hatch, 37 Hun. 375; People vs. Ince, 204 N. Y. 478, affirming 148 A. D. 933; Clapp vs. McCabe, 84 Hun. 379; affirmed 155 N. Y. 525) and when dealing with a Federal question, particularly when such amendment, whether it increases or decreases the juris-[fol. 19] diction, violates Section 2 of Article 4 of the Federal Constitution, which provides in part: "That the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states," and that therefore Section 47 of the General Corporation Law which attempts to limit the jurisdiction of our Supreme Court is void in its entirety.

2. The decision of Murnan vs. Wabash Railway Company, 246 N. Y. 249, is not binding and controlling upon this Court in so far as it establishes the law to the effect that as matter of law the Supreme Court of this State is vested with discretion to hear or not to hear an action

brought under the Federal Employers' Liability Act. While this statement may seem peculiar and not in accord with the general understanding of the binding effect of a decision of the Court of Appeals upon the interpretation of the law by subordinate State Courts it is based upon the authoritative statement of the United States Supreme Court in the case of Canadian Northern Railway Company vs. Egan, 252 U. S. 553, where that Court said: "The principle upon which this wholly rests is that the Constitutional requirement is satisfied if the non-resident is given access to the Courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to residents and citizens. The power is in the Courts, ultimately in this Court, to determine the adequacy and the reasonableness of such terms." It therefore seems reasonable and wholly proper to say that this Court is at liberty and properly so to wholly disregard the pronouncements of the Court of Ap- [fol. 20] peals when construing a Federal Statute and the Federal Constitution and say that the Courts of this State must give access to our Courts to non-residents in the same manner as they must give access to our Courts to residents.

In Taylor vs. Taylor, 144 App. Div. 634, aff'd 204 N. Y. 135 and reversed in 232 U. S. 363, where the action was brought under the very act in question the Supreme Court remanded the cause for further proceedings not inconsistent with its opinion and said at pages 367 and 368:

"We have had many occasions to declare the comprehensive and exclusive power which Congress possesses over interstate commerce. And starting with that power as a factor, we have only to consider the breadth and meaning of the act of Congress. * * * In Second Employers' Liability Cases * * * it and its amendments were declared to be constitutional; that having been enacted in pursuance of a power reserved to Congress, state laws must give way to them. They established the policy for all, it was decided, and the Courts of a State cannot refuse to enforce them on the ground that they are not in harmony with the policy of the State. Congress having acted, it was said, that the laws of the states, in so far as they cover the same

field, are superseded; for necessarily that which is not supreme must yield to that which is."

Such construction of Section 2 of Article 4 of the Federal Constitution has been sustained and upheld in Smith vs. Loughman, 245 N. Y. 486 and in Travis vs. Yale & Towne Mfg. Co., 252 U. S. 60, where in the former case a State statute imposing a different tax rate on inheritance transfers of non-residents than that on residents was held unconstitutional and in the latter case where the income tax law allowing different exemptions to residents and non-residents was likewise held unconstitutional.

[fol. 21] 3. A further reason is found in Mondeau vs. New York, New Haven & Hartford Railroad Co., 223 U. S. 1, where the United States Supreme Court in reversing the courts of Connecticut in refusing to take jurisdiction of a similar action, held that the inclination of such Courts to decline jurisdiction in a case of this kind is "quite inadmissible," and that when Congress established the policy it established a "policy for all of the states," and that the imposition of such jurisdiction would probably not be attended by any appreciable inconvenience, but even if so "it affords no reason for declining the jurisdiction conferred by law." And the claimant's rights under the Federal Act may be enforced "as of right in the Courts of any of the States where jurisdiction as prescribed by local laws is adequate to the occasion."

We assume that the contention will not be raised that the jurisdiction of our Supreme Court is inadequate for the trial of such cases; in fact such an assumption would hardly need notice in view of the fact that almost every day in the week cases under the Federal Act in question and the Safety Appliance Acts are regularly being tried in our Supreme Court.

Wherefore, deponent respectfully submits that defendant's application should be denied both as matter of law and as matter of discretion.

Charles D. Lewis.

Sworn to before me this 23d day of January, 1928.
Frank J. Hyland, Notary Public, Westchester Co., N. Y.

[fol. 22] IN SUPREME COURT OF NEW YORK

[Title omitted]

AFFIDAVIT OF CHARLES L. DOUGLAS

STATE OF CONNECTICUT,
County of ——, ss:

Charles L. Douglas, being duly sworn, deposes and says: That I reside at 90 Knoll Street, Waterbury, Connecticut, and that I have resided in the State of Connecticut fifteen years, and that on the 1st day of December, 1927, while I was employed by the New York, New Haven and Hartford Railroad Company, and while I was switching cars in the Waterbury Yard, Connecticut, engaged in Interstate Commerce, I was caught between two cars on adjoining tracks and severely and permanently injured.

I instituted this action in the Supreme Court, Westchester County, because I did not desire to bring such action in the State Courts of the State of Connecticut, primarily because of the fact that during my residence in the State of Connecticut I have heard and read of the small and inadequate verdicts rendered in the State Courts of Connecticut for personal injuries against this railroad company, and because of the further fact that the defendant railroad company is the largest and strongest railroad operating in the State of Connecticut, and has great influ-
[fol. 23] ence in the State, and employ thousands of men and women in its various undertakings in the State.

Charles L. Douglas.

Sworn to before me this 20th day of January, 1928. William P. Wertheimer, Notary Public, at Waterbury, Conn.

IN SUPREME COURT OF NEW YORK

[Title omitted]

OPINION

The Court of Appeals in the Murnan case (246 N. Y. 244) has settled the question as to the discretionary power of

the Supreme Court at Special Term to grant this motion, and I think that that discretion should be so exercised as to relieve the Courts of this State of the burden of cases that arise in another state and in which none of the parties is a resident of this state. Motion granted.

A. S. T., J. S. C.

[fol. 24] In Supreme Court of New York

Stipulation Waiving Certification

It is hereby stipulated and agreed between the attorneys for the plaintiff and defendant herein that the papers as heretofore printed consist of true and correct copies of the notice of appeal, the order appealed from, and all papers on which the Court below acted in making the order appealed from and the whole thereof, now on file in the office of the Clerk of the County of Westchester, and that the certification thereof, pursuant to Section 616 of the Civil Practice Act, is hereby waived.

Dated February —, 1928.

Thomas J. O'Neill, Attorney for Plaintiff-Appellant.
John M. Gibbons, Attorney for Defendant-Respondent.

[fol. 25] In Supreme Court of New York, Appellate Division, Second Department

[Title omitted]

Stipulation as to Citizenship

It is hereby stipulated that at all the times mentioned in the complaint in this action the plaintiff was and he now is a citizen of the United States, and a citizen and resident of the State of Connecticut; and it is

Further stipulated that the above stipulated facts and admission be annexed to and form part of the record on appeal in this Court upon the appeal recently argued herein and not yet decided by this Court, and which appeal is from an order dated February 11, 1928, granting defendant's mo-

tion to vacate the service of the summons and complaint and dismissing the action.

Dated March 8, 1928.

Thomas J. O'Neil, Attorney for Plaintiff-Appellant.
John M. Gibbons, Attorney for Defendant-Respondent, per E. R. Brumley, of Counsel.

[fol. 26] In Supreme Court of New York, Appellate Division

[Title omitted]

Order of Affirmance—March 21, 1928

The above named Charles L. Douglas, the plaintiff in this action, having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court entered in the office of the Clerk of the County of Westchester on the 15th day of February, 1928, granting defendant's motion to vacate the service of the summons and complaint and to dismiss the action herein, and the said appeal having been argued by Mr. Charles D. Lewis of Counsel for the appellant and argued by Mr. E. R. Brumley of Counsel for the respondent, and due deliberation having been had thereon.

It is ordered that the order so appealed from be and the [fol. 27] same is hereby unanimously affirmed, with $10 costs and disbursements.

Enter.

E. L., P. J.

Certificate to foregoing paper omitted in printing.

[fol. 28] In Supreme Court of New York

[Title omitted]

Judgment Entered on Remittitur—April 5, 1928

The above named plaintiff, Charles L. Douglas, having appealed to the Appellate Division of the Supreme Court,

Second Judicial Department, from an order vacating the service of the summons and complaint and dismissing the action herein, entered in the office of the Clerk of the County of Westchester on February 15th, 1928; and the said Appellate Division having unanimously ordered and adjudged that the order appealed from be affirmed, and that the respondent recover of the appellant the costs of this appeal; and the defendants costs and disbursements having been duly taxed at One Hundred and 45/100 Dollars ($100.45);

Now, on motion of John M. Gibbons, attorney for the defendant herein, it is

Ordered and adjudged that the order so appealed from be, and the same hereby is, in all respects unanimously affirmed, and that the defendant have judgment against the plaintiff, Charles L. Douglas, for the costs and disbursements of the appeal to the Appellate Division, Second Judicial Department, amounting to One Hundred and 45/100 Dollars ($100.45); and that execution issue therefor.

Enter.

Chas. J. F. Decker, Clerk.

[fol. 29] IN SUPREME COURT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

SIRS: Please take notice that the plaintiff-appellant hereby appeals to the Court of Appeals of the State of New York from the order of the Appellate Division, Second Department, dated March 21, 1928, and entered in the office of the Clerk of the County of Westchester, on March 29, 1928, which unanimously affirmed with costs the order of the Supreme Court, entered in the office of the Clerk of the County of Westchester, on February 15, 1928, granting defendant's motion to vacate the service of the summons and complaint and to dismiss the action herein; and the plaintiff also appeals to the said Court of Appeals from the judgment entered on the said order and remittitur of

the said Appellate Division, which judgment was entered in the office of the Clerk of the County of Westchester on April 5, 1928, and which judgment unanimously affirmed the aforesaid order and judgment entered in said Clerk's office on February 15, 1928, dismissing the complaint and awarded costs against the plaintiff, and the plaintiff appeals from each and every part and all of said order of the Appellate Division and the judgment entered on the re-[fol. 30] mittitur of the said Appellate Division, entered in said Westchester County Clerk's office on April 5, 1928.

Yours, &c., Thomas J. O'Neill, Attorney for Plaintiff-Appellant, 189 Main Street, White Plains, N. Y.

To Charles J. F. Decker, County Clerk, Westchester Co.; John M. Gibbons, Esq., Attorney for Defendant Respondent, Room 3841, Grand Central Terminal, New York City.

[fol. 31] In Supreme Court of New York

[Title omitted]

Affidavit of No Opinion

County of Westchester, ss:

Charles D. Lewis, being duly sworn, deposes and says that he is an attorney and counsellor at law, associated with Thomas J. O'Neill, the attorney for the plaintiff, and that he has had charge of this case and is familiar therewith, and that at the time of the rendition of the order of the Appellate Division herein, bearing date March 21, 1928, unanimously affirming the order of the Special Term the said Appellate Division did not render any written opinion.

Charles D. Lewis.

Sworn to before me this 12th day of April, 1928. Frank J. Hyland, Notary Public, Westchester Co., N. Y.

[fol. 32] IN SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION

It is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the notice of appeal to the Court of Appeals, the order and judgment of affirmance appealed from and all the papers upon which the Court below acted in making the order and judgment appealed from, and the whole thereof, now on file in the office of the Clerk of the County of New York.

Certification thereof in pursuance of Section 616 of the Civil Practice Act is hereby waived.

Dated New York, April 20, 1928.

Thomas J. O'Neill, Attorney for Plaintiff-Appellant.
John M. Gibbons, Attorney for Defendant-Respondent.

Certificate to foregoing papers omitted in printing.

[fol. 33] IN SUPREME COURT OF NEW YORK

[Title omitted]

ORDER—June 6, 1928

This cause having been brought on upon the remittitur herein, sent down from the Court of Appeals, and now filed in this Court, by which remittitur it appears that an appeal was taken by the plaintiff from an order and judgment of affirmance of the Appellate Division of the Supreme Court, Second Judicial Department, the order having been entered March 29th, 1928, and the judgment in amount of One Hundred and 45 100 Dollars ($100.45) having been entered on April 5th, 1928, said order and judgment affirming an order vacating the service of the summons and complaint and dismissing the action herein, entered in the office of the Clerk of the County of Westchester on February 15th, 1928; and it further appearing by said remittitur that the order of affirmance of the Appellate Division and the judgment appealed from by the plaintiff have been affirmed and the

service of the summons and complaint vacated and the action dismissed, with costs by the Court of Appeals, and that the record and proceedings have been directed by said Court of Appeals to be remitted to this Court, and this Court directed to enforce the judgment of the said Court of Appeals, according to law;

Now, therefore, upon motion of John M. Gibbons, the attorney for the defendant, The New York, New Haven and [fols. 34 & 34½] Hartford Railroad Company, it is

Ordered and adjudged that the judgment in the said Court of Appeals be, and the same hereby is, made the judgment of this Court; and that the defendant, The New York, New Haven and Hartford Railroad Company, have judgment against the plaintiff for costs, when adjusted by the Clerk and inserted in this judgment, and that this order for judgment be annexed to the judgment roll.

Enter.

A. S. Tompkins, J. S. C.

Certificate to foregoing paper omitted in printing.

[Endorsed:] Filed June 6, 1928. Chas. J. F. Decker, Clerk.

[fol. 35] In Supreme Court of New York

[Title omitted]

Judgment—Filed June 6, 1928

An order in this action vacating the service of the summons and complaint and dismissing the action herein, having been entered in the office of the Clerk of the County of Westchester on February 15th, 1928; and the plaintiff having appealed from said order to the Appellate Division of the Supreme Court, Second Judicial Department, and said order having been affirmed in all things by the said *by the said* Appellate Division of the Second Judicial Department, and order of affirmance having been entered thereon on the 29th day of March, 1928, and judgment of affirmance in amount of One Hundred and 45 100 Dollars ($100.45) having been entered thereon on April 5th, 1928; and said

plaintiff having appealed to the Court of Appeals from said order and judgment of affirmance of the Appellate Division, Second Judicial Department; and the said Court of Appeals having sent hither its remittitur, filed herein on the 6th day of June, 1928, by which it appears that the said Court of Appeals has affirmed the said judgment and order vacating the service of the summons and complaint and dismissing the complaint herein, with costs, and has given judgment accordingly and has remitted the judgment of the said Court of Appeals to this Court to be enforced according to law; and this Court having by an order entered herein on the 6th day of June, 1928, ordered that said judgment be made the judgment of this Court, with costs, and the costs having been adjusted by the Clerk of this Court in amount of — Dollars ($295.60);

[fols. 36 & 37] Now, on motion of John M. Gibbons, attorney for the defendant, it is

Ordered and adjudged that the judgment of the said Court of Appeals be, and the same hereby is, made the judgment of this Court; and that the order and judgment of the Appellate Division, Second Judicial Department, affirming the order of this Court vacating the service of the summons and complaint and dismissing the complaint herein, and entered in the office of the Clerk of the County of Westchester on March 29th, 1928 and April 5th, 1928, respectively, be, and they hereby are, affirmed, and the service of the summons and complaint vacated, and the action dismissed, with costs; and the costs having been duly taxed herein at the sum of Two Hundred Ninety-Five and 60/100 Dollars ($295.60/100), and that it have execution therefor.

And it is further ordered and adjudged that the said defendant, The New York, New Haven and Hartford Railroad Company, recover from the said plaintiff, Charles L. Douglas, the sum of Two Hundred Ninety-Five and 60/100 Dollars ($295.60/100) costs as taxed herein, and that it have execution therefor.

Dated New York, June 6th, 1928.

Chas. J. F. Decker, Clerk.

Certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

[fol. 38] Service of three copies is hereby admitted.
April 20, 1928.

John M. Gibbons, Atty. for Deft.

Endorsed on cover: File No. —. New York Supreme Court. Term No. —. Charles L. Douglas, petitioner, vs. The New York, New Haven and Hartford Railroad Company. Petition for writ of certiorari and exhibit thereto. Filed July —, 1928. File No. —.

(2300)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 15, 1928

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3927)